

EXIGENCY OF AN OVERHAUL IN FOREST LAW: HOW THE FOREST (CONSERVATION) AMENDMENT ACT, 2023, HAS TRANSFORMED INDIA'S FOREST REGIME

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The Forest Conservation (Amendment) Act, 2023, ('the Amendment Act') has introduced significant changes to the Forest Conservation Act of 1980. The amendments have diluted the forest conservation law regime in India by introducing multiple exemptions and definitional loopholes to circumvent conservation obligations. The prevailing state of affairs has been further worsened and decapitated by unreliable forest data, which was one of the main criticisms of the India State of Forest, 2021, report. These amendments have been introduced at a time when international agreement on cooperative action towards climate change mitigation has gained pace, as evident in the recently concluded 28th session of the Conference of Parties. This paper seeks to critically analyse the fundamental changes that have been introduced by the Amendment Act, through an assessment of the scale of the potential consequences. The paper also seeks to present the problems inherent in the mechanisms adopted for recording forest data of India, along with modifications that have the potential to improve its qualitative character. Furthermore, an argument for overhaul in the forest law regime of India has been made, in light of the observations made in Global Stocktake and India's nationally determined contributions under the Paris Agreement. Certain indispensable attributes of an ideal forest conservation law have been elaborated upon to advance the need of a new forest conservation law.

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I. INTRODUCTION

The Indian Parliament passed the Forest Conservation (Amendment) Act, 2023, ('the Amendment Act') in the monsoon session without any fruitful debate or vociferous opposition.¹ Subsequently, after the Presidential assent, the amendments have fundamentally transformed the legal regime on forest conservation of the country.² Though the Forest Conservation Act, 1980 ('FCA') was never an ideal conservation law to begin with, the 2023 amendments have further significantly diluted the forest protection regime of the country.

A brief overview of the unamended FCA may be helpful in understanding the context and impact of the amendments. Before FCA, the Indian Forest Act, 1927 ('IFA') was the sole statutory legislation that governed the management of the country's forests. IFA vested the right of declaring forests as reserved, protected and village-forests with the State Governments, given that forests were included in List II of the Seventh Schedule (State List) before the Constitution (Forty-Second Amendment) Act, 1976.³ In 1976, forests were shifted to List III of the Seventh Schedule, which delineates the Concurrent List. The primary reason for establishing the Union Government's oversight over forest management was the plummeting forest cover in the country and the increasing international discourse on environmental conservation.⁴ Notably, the Chipko movement also took

¹ The Forest Conservation (Amendment) Act, 2023.

² *Does Bill Amending Forest Conservation Act Boost India's Green Legacy or Put it at Risk?*, DOWN TO EARTH, August 7, 2023, available at <https://www.downtoearth.org.in/blog/forests/does-bill-amending-forest-conservation-act-boost-india-s-green-legacy-or-put-it-at-risk--91039> (Last visited on November 10, 2023).

³ The Indian Forest Act, 1927, §3.

⁴ Shyam Divan & Armin Rosencranz, ENVIRONMENTAL LAW AND POLICY IN INDIA, 405 (Oxford University Press, 2022).

place in this decade, which marked the zenith of the Indian forest conservation drive.⁵

In 1980, the Parliament passed the FCA which was the first legislation that seemingly established certain forest conservation practices and principles in the country's environmental jurisprudence. However, this does not warrant the assumption that the legislation is devoid of irregularities and loopholes. The FCA, as will be substantiated in the later stages of this paper, presumes a perpetual role of guardianship of the Union Government towards forest conservation, which has now come home to roost.

However, the amendments to the FCA have rendered it hollow by incorporating provisions which are antithetical to the essence of forest conservation. These provisions have bestowed a veneer of legality on activities which are disastrous for the country's forest cover. The debate on the setback to forest conservation regime of India has been overshadowed by other issues prevalent in mainstream media and parliamentary discussions. Consequently, the concern for forests and ecological conservation has been relegated to a lower pedestal.

The defenders of the amendments, notably the Ministry of Environment, Forest and Climate Change ('MoEFCC') seek to argue that these will help in achieving the country's nationally determined contributions ('NDCs') of building carbon sink and reaching net-zero target.⁶ Under the Paris Agreement, 2015, ('the Paris Agreement') which is the current operational set of international obligations of the United Nations Convention Framework on Climate Change ('UNFCCC'), parties are required to curate a set of national goals to reduce greenhouse gas ('GHG') emissions, and mitigate the detrimental impacts of climate change.⁷ These national goals express the nation's ambitions for contributing in global mitigatory pledge under the agreement.⁸ In the first set of NDCs submitted by India in 2015, the country pledged to create carbon sink of 2.5 to three billion tonnes of CO₂ equivalent "through additional forest and tree cover",⁹ among other goals. In 2022, the goals were revised, as required by the agreement, and the goal for reaching net-zero GHG emissions by 2070 was incorporated.¹⁰

⁵ Pradeep Bahuguna, *Chipko: A Movement that Gave Forest Conservation a New Life*, FRONTLINE (THE HINDU), August 21, 2021, available at <https://frontline.thehindu.com/environment/photo-essay-chipko-a-movement-that-gave-forest-conservation-a-new-life/article35831455.ece> (Last visited on December 23, 2023).

⁶ *Joint Committee on the Forest (Conservation) Amendment Bill, 2023*, Seventeenth Lok Sabha, *Report of the Joint Committee on the Forest (Conservation) Amendment Bill, 2023*, ¶2.2.4 (July, 2023) ('Joint Committee Report').

⁷ Paris Agreement, December 12, 2015, FCCC/CP/2015/10/Add.1, Art. 4(2).

⁸ *Id.*, Art. 4(3).

⁹ PRESS INFORMATION BUREAU, *Cabinet Approves India's Updated Nationally Determined Contribution to be Communicated to the United Nations Framework Convention on Climate Change*, August 3, 2022, available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1847812> (Last visited on November 10, 2023).

¹⁰ Paris Agreement, *supra* note 7, Art. 4(9).

However, the potential impacts of the amendments are precisely the opposite as submitted by expert stakeholders and various State governments before the Joint Committee of Parliament ('JPC') which scrutinised the Amendment Act in its initial stage.¹¹ The problem becomes graver when the country's forest cover data, as recorded biennially by the Forest Survey of India ('FSI'), is contested on grounds of incorrect methodology, deceptive criteria for 'forest' identification, and lack of easy access to such recorded data.¹² This data becomes more important after the amendments as the revised legislation places considerable reliance on forest data as present in governments records for the applicability of the FCA.

Another concerning pattern that can be seen while analysing the overall scheme of the amendments is how it diverges from principles enumerated under the National Forest Policy of India, 1988 ('FPI'). Although the FPI was introduced eight years after the FCA, it is striking to note the highly accommodative principles in the former which prioritised forest conservation over unhindered economic development.¹³ The amendments have detached themselves from these guiding principles, and watered down an already abysmal scheme of checks and limitations which were introduced in FCA.

Part II of this paper examines the amendments at length. This part has been further divided into four sections where the author analyses each substantive addition and changes to the FCA in detail by documenting comments of experts who submitted before the JCP. The paper discusses the potential impacts on the overall conservation scheme, with the help of some judicial pronouncements. In Part III of this paper, the author investigates the important aspect of documentation of forest data by the FSI. An analysis of various criteria and yardstick used by FSI will reveal multiple flaws including incorrect techniques of mixing the definitions of forests and tree plantations. Parallels between a study conducted in Southwestern China and the Indian scenario have been drawn to highlight the wide consensus on observing such distinction.

Part IV of this paper explores the exigency of overhauling the forest conservation law of India by observing the urgency of forest restoration and replenishment, as agreed upon by the international community. The paper further enumerates four indispensable characteristics that an ideal forest conservation law in India should incorporate for accomplishing conservation and replenishment of forests holistically. Part V offers the concluding remarks.

¹¹ *Joint Committee Report*, *supra* note 6, ¶¶2.2.9, 2.2.11.

¹² Jay Mazoomdaar, *The Case for Open, Verifiable Forest Cover Data*, THE INDIAN EXPRESS (DELHI), March 2, 2023, available at <https://indianexpress.com/article/explained/explained-climate/india-forest-tree-cover-data-deforestation-explained-8474163/> (Last visited on December 15, 2023); see also Jay Mazoomdaar, *In Chase for Growth and Carbon Targets, Questions Swirl Over Forests on Paper*, THE INDIAN EXPRESS (DELHI), March 2, 2023, available at <https://indianexpress.com/article/express-exclusive/in-chase-for-growth-carbon-targets-questions-swirl-over-forests-on-paper-8474191/> (Last visited on December 8, 2021).

¹³ The National Forest Policy of India, 1988, ¶¶2.1, 2.2, 4.1, 4.4.1, 4.3.1.

II. LEGISLATIVE ISSUES: SCRUTINISING THE 2023 AMENDMENT

The provisions that have been incorporated in FCA through the amendments have led to certain observations about the pragmatism to ensure conservation of the forest areas in India through this particular statute. These provisions necessitate a close scrutiny and enquiry into its potential consequences to adjudge whether the FCA is sufficient to accomplish the aim of protecting and expanding carbon sinks to be on track to fulfil the country's NDCs. This part dissects and contextualises the amendments in order to comprehend these impacts. Specific focus has been directed on two particular provisions. *First*, the exclusion of certain types of forest areas from the application of FCA,¹⁴ and *second*, the expansion in the list of activities not to be construed as 'non-forest activities'.¹⁵ This assists in highlighting the shift from preservation of forest tracts to creating opportunities for bypassing conservation obligations. This is preceded by a documentation of basic impression for understanding the broad problems that the amendments have raised.

A. AN OVERVIEW OF FUNDAMENTAL CHANGES TO FCA

Before intricately testing the amendments, some general observations regarding the intention and the *modus operandi* of the Union Government – as evident *prima facie* from the type of amendments made – are required to be stated for providing proper context.

First, the amendments have intensified the supremacy of the Union Government by vesting it with powers to *inter alia*, issue "orders", and "directions" to anybody under the Union Government, State Governments or Union Territory Administration, to define the inherent ambiguities introduced with the passage of time.¹⁶ It creates an environment of uncertainty as various clarifications regarding numerous ambiguous terms may be made in a *post facto* manner, and provides a leeway of arbitrary moulding of policy by the Union Government. Even though 'forests' are a legislative subject placed in List III of the Seventh Schedule of the Indian Constitution,¹⁷ the various additions made by the amendments seek to tilt the scales of power in favour of the Union. For instance, the power of the Union to notify activities which may be deemed as not included in the definition of "non-forest purpose", apart from the residuary power of notifying Left-Wing Extremism affected areas. Herein, §2, Explanation (viii) of the Amendment Act explicitly provides wide, residuary powers to the Union to identify non-forest activities and issue necessary orders. This is unlike the provisions of the FCA.

¹⁴ The Forest Conservation (Amendment) Act, 2023, Cl. 4, §1A(2).

¹⁵ *Id.*, Cl. 5, §2(1), Explanation.

¹⁶ *Id.*, Cls. 4-6, §§1A, 2, 3C.

¹⁷ The Constitution of India, Sch. VII, Entry 17A (Forests).

Given the significantly increasing role of private corporations in impacting and shaping policy decisions of the government, there is a high likelihood that irreversible damages to the forest resources of the country will emanate at the behest of arbitrary and non-transparent governmental orders/directions. This possibility can be foreseen by considering cases where forest clearances have been issued, after flouting essential requirements of public hearing and consent of the residents of forest areas such as in Hasdeo Aranya, Chhattisgarh.¹⁸ Another instance of non-transparency in granting of approval for forest clearance was regarding the environmental degradation of Niyamgiri Hills. Located in Odisha, the case pertained to certain mining operations conducted by Vedanta that took place at behest of environmental clearance granted by the State and Union Governments, while ignoring the protests undertaken by indigenous communities.¹⁹ Yet another imperative and contemporaneous example is the Great Nicobar Holistic Development Plan, which seeks to establish port, airport, and a town, *inter alia*, to boost international trade prospects that are largely carried out by private entities in ecologically fragile and forest-dense Great Nicobar island. It has been documented that forest clearance for the felling of at least 9.64 lakh trees and environmental clearance for the same have been approved.²⁰ This is despite the alarms raised by experts about the irreversible damage that will be meted out to the biodiversity of the island along with detrimental impacts on the indigenous people, such as the Shompen community.²¹

With the authority to issue orders after the amendments, the Union Government has an all-encompassing power to interpret the provisions according to the needs prevalent in the time under consideration. These needs can arise from interests put forth by private corporations, shielding themselves with the unquestioned model of economic development. These needs can also arise in the context of securing 'national interest' and for the sake of 'national security' as has been ambiguously codified through the Amendment Act.²² Another scenario can be the government's policy to boost trade and commerce by promoting eco-tourism and establishing zoos and safaris which can potentially interfere in the preservation of pristine ecosystems and biodiversity. Moreover, there are no express constraints

¹⁸ *Chhattisgarh Mining Projects Violating Forest Act: Activists*, HINDUSTAN TIMES, February 28, 2020, available at <https://www.hindustantimes.com/india-news/chhattisgarh-mining-projects-violating-forest-act-activists/story-LLlbBXstxCNwNrfHd5VotO.html> (Last visited on November 10, 2023).

¹⁹ Valay Singh, *Odisha's Niyamgiri Hills — and its People — Are Still under Threat*, THE WIRE, April 23, 2018, available at <https://thewire.in/rights/odishas-niyamgiri-hills-and-its-people-are-still-under-threat> (Last visited on December 8, 2023).

²⁰ Jacob Koshy, *Great Nicobar Project may See 9.64 Lakh Trees Axed, Says Minister*, THE HINDU, August 3, 2023, available at <https://www.thehindu.com/sci-tech/energy-and-environment/great-nicobar-project-may-see-964-lakh-trees-axed-says-minister/article67154281.ece> (Last visited on December 14, 2023).

²¹ Pankaj Sekhsaria, *Despite Red Flags, Mega Project on Ecologically-Sensitive Great Nicobar Island Gets Green Signal*, SCROLL.IN, November 15, 2022, available at <https://scroll.in/article/1037433/despite-red-flags-mega-project-on-ecologically-sensitive-great-nicobar-island-gets-green-signal> (Last visited on December 8, 2023).

²² The Forest Conservation (Amendment) Act, 2023, Cl. 4, §1A(2)(c)(i).

imposed on issuance of such orders or directions in terms of time and content, which strengthens the hegemonic position of the Union Government.

Second, taking a bird's eye view of this entire amending exercise, a dominant paradox between the stated objectives in the Preamble and the substantive amendments emerges. The Preamble attempts to aver that amended FCA will be in consonance with the country's international obligations under the Paris Agreement and the UNFCCC, namely the net-zero target by 2070,²³ and NDC of creating a "carbon sink".²⁴ However, as documented by the JPC report, many experts and even States such as Sikkim and Mizoram have pointed out that the objectives of Preamble are clearly at loggerheads with the amendments made to FCA.²⁵ The Amendment Act has reduced the extent of forest area over which FCA will be applicable for the purpose of forest conservation and forest clearance. This has been accomplished by narrowing down the definition of what types of 'forests' are covered by FCA, along with expressly exempting certain types of forest tracts from the application of FCA.²⁶ This means that tracts which cannot be construed as forest under FCA are vulnerable to deforestation without any governmental permission, in the form of forest clearance, required.

Additionally, certain activities such as establishment of zoos and safaris, and eco-tourism, have been interpreted as to not being included in the list of 'non-forest purpose' activities,²⁷ which has further weakened barriers against forest destruction. The primary consequence of these tweaks is that forest lands have been made more exposed to deforestation which goes against the country's obligation of enhancing the coverage area of carbon sink for carbon sequestration. Interestingly, one expert stated that the provisions of the Amendment Act invited the renaming of the FCA to "Forest Clearance Act", observing the reductionist perception among the forest clearance seekers about FCA, and the divergence from the legitimate and ideal objective of actually prioritising conservation of forest over clearance of forest.²⁸

Third, the wider debate that the amendments ignite is of 'conservation *versus* development'. The seemingly unending conundrum about which one to prioritise²⁹ has been solved by the amendments which have taken the side of devel-

²³ *Explained: PM Modi's Climate Promises, and How Far India is on Track to Meet Them*, THE INDIAN EXPRESS, November 9, 2021, available at <https://indianexpress.com/article/explained/explained-pms-climate-promises-and-how-far-india-is-on-track-to-meet-them-7611943/> (Last visited on November 10, 2023).

²⁴ *Meeting India's 'Carbon Sink' Target*, THE INDIAN EXPRESS, March 9, 2023, available at <https://indianexpress.com/article/explained/explained-climate/meeting-indias-carbon-sink-target-co2-emission-paris-climate-conference-8484854/> (Last visited on November 10, 2023).

²⁵ *Joint Committee Report*, *supra* note 6, ¶¶2.2.8, 2.2.11.

²⁶ The Forest Conservation (Amendment) Act, 2023, Cl. 4, §1A.

²⁷ *Id.*, Cl. 5, §2(1), Explanation.

²⁸ *Joint Committee Report*, *supra* note 6, ¶2.3.5.

²⁹ *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647, ¶10; *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664, ¶¶236, 242; *T.N. Godavarman Thirumulpad v.*

opment and subordinated conservation considerations. This assertion will become clearer by scrutinising §1A(2), Explanation to §2(1), and §2(2) of the Amendment Act. For instance, §1A(2) exempts the application of FCA in cases of ‘strategic linear projects’ of national importance, and forest land adjacent to public roads, and the rail lines. The Explanation to §2(1) exempts activities such as the establishment of zoos and safaris, and the creation of eco-tourism facilities from seeking forest clearance. Lastly, §2(2) further gives a leeway to survey activities such as exploration and reconnaissance, by precluding these from the purview of FCA.

Fourth, there is a shift in which entities are more likely to commit activities that can potentially threaten the goal of forest conservation, especially after the amendments. Earlier, cases before the Supreme Court (‘SC’) under §2, which pertains to the mandatory requirement of obtaining forest clearance from the Union Government in cases of undertaking non-forest purpose activities, were concerned with illegal mining or timber production by private entities.³⁰ The unamended FCA itself was framed in such a way so as to guard against forest destruction by private entities through the requirement of forest clearance. This was under the assumption that the Union Government would remain a *bona fide* guardian of the forests and would give due consideration to forest conservation while approving developmental projects. However, contradicting this principle, it is easily deducible that, especially after the amendments, it is the Union that has armed itself with all exemptions to partake in forest destruction. The alignment in profit interests between the government and private entities in multiple cases such as in Hasdeo Aranya, which has been elaborated upon in a later stage of this part, has completely wrecked the purpose of FCA.

B. ANALYSIS OF NOTEWORTHY AMENDED PROVISIONS

§1A(1) of the Amendment Act seeks to define forestland governed by the FCA. This includes land identified as forest under IFA or any other statute, or otherwise, recognised as forest after the operationalisation of unamended FCA by any type of Government record. Interestingly, the proviso excludes application of FCA over any forest land that has been diverted to non-forest purposes before the *T.N. Godavarman Thirumulpad v. Union of India* (‘T.N. Godavarman’) order of 1996. The court in this case defined forest covered by the FCA as any land that satisfies the dictionary meaning of forest, irrespective of ownership and classification.³¹ This means that any diversion which took place before 1996 will get the stamp of legality.³²

Union of India, (2022) 9 SCC 306, ¶16 (‘T.N. Godavarman’).

³⁰ T.N. Godavarman, *supra* note 29; Chandra Prakash Budakoti v. Union of India, (2019) 10 SCC 154; Supreme Court Monitoring Committee v. Mussoorie Dehradun Development Authority, (1997) 11 SCC 605.

³¹ T.N. Godavarman, *supra* note 29, ¶4.

³² *Joint Committee Report*, *supra* note 6, ¶2.4.42.

Irrespective of this retrospective immunity, taking a broader view and addressing the most blatant violation of the 1996 order is the narrowing down of the definition of forest itself. In the 1996 order, the SC confronted a void arising due to a lack of definition of ‘forest’ provided in the FCA or IFA. Consequently, forest was defined as any land which conforms to the dictionary meaning of forest irrespective of ownership and classification.³³ Taking forth the legacy of 1996 definition, in *Supreme Court Monitoring Committee v. Mussoorie Dehradun Development Authority*,³⁴ SC defined forests as “including an extensive tract of land covered with trees and undergrowth, sometimes intermingled with pasture, i.e., it will have to be understood in the broad dictionary sense”.³⁵ While the definition provided by the SC in 1996 order was progressive and ecologically appropriate for purpose of forest conservation in substance, the Amendment Act watered down this definition.

As opposed to the aforesaid definition of forests as provided under the 1996 order,³⁶ the amendments have made the definition of forest contingent upon ambiguous timelines. This includes the timelines for the FCA’s applicability on forests which have been recorded as such on or after October 25, 1980, along with legitimising the diversion of forest land that occurred before December 12, 1996.³⁷ The definition has also been made dependent on revenue records which have recorded lands as forest land.³⁸ These criteria fail to explain the reason for excluding other tracts of forest land, which do not fulfil these requirements. These tracts of forest land include tracts located along railway lines and public roads, tree plantations, and reforested land.³⁹ Apart from these tracts, forests situated in three areas have also been exempted from the application of FCA – *first*, forests located within hundred kilometres from international borders, *second*, up to ten hectares for establishing security infrastructure, and *third*, up to five hectares in Union Government-notified ‘Left-Wing Extremism affected area’.⁴⁰ This entire process of narrowing definitions and expressly precluding certain types of forest areas has diluted the application of FCA overall forest resources of the country.

It must be understood that forest is not a resource with benefits confined to the private owner of such land, whose interest is being addressed by this change in definition. For instance, in submissions before JCP, MoEFCC cited the plight of plantation growers who are reluctant to engage in plantation on non-forest lands for the fear that the same could be construed as forest.⁴¹ This could have imposed the requirement of obtaining forest clearance from the Union Government,

³³ T.N. Godavarman, *supra* note 29, ¶4.

³⁴ (1997) 11 SCC 605.

³⁵ *Id.*, ¶1.

³⁶ T.N. Godavarman, *supra* note 29, ¶4.

³⁷ The Forest Conservation (Amendment) Act, 2023, Cl. 4, §1A(1)(b) & Proviso.

³⁸ *Id.*, Cl. 4, §1A, Explanation.

³⁹ *Id.*, Cl. 4, §1A(2).

⁴⁰ *Id.*, Cl. 4, §1A(2)(c).

⁴¹ *Joint Committee Report, supra* note 6, ¶1.11.

and thus, reduce the freedom of plantation owners to deforest the plantation land. As a corollary, it is not difficult to interpret that the plantations being referred to by the Union Government are commercial monoculture plantations of palm, or other lucrative timber producing species of plants such as eucalyptus and teak, which are cut down for commercial extraction after the optimum and profitable level of growth is achieved.⁴² If the plantation for carbon sequestration and conservation of biological diversity would have been the aim, as argued by the MoEFCC before JCP,⁴³ then it would be more suitable to bestow plantations the protection of FCA. This would have ensured the preservation of plantations which seek to replenish natural forests and sequester atmospheric carbon content. While government stresses the fact that excluding them from the purview of FCA will encourage creation of more carbon sinks, it is instead leading to prioritisation of commercial interests over ecological interests of keeping the plantations intact for regeneration of diminishing natural forests.

More significantly, tweaking the definition of forests to assuage concerns of plantation growers is doing more harm than good, by rendering huge tracts of natural forest which are unrecorded and vulnerable to destruction for developmental purposes. The provision places immense emphasis on Government records, namely records kept by revenue and forest departments or any recognised local authority, in which the lands have been documented as forest land. While the Union Government is hinging upon the recordkeeping of forestlands for determining application of FCA, it is crucial to note that some States such as Nagaland and Mizoram (which sought clarification on the type of record to be used for determining 'forest' under FCA⁴⁴) either do not have records of forest lands or have outdated land records.⁴⁵ In general, land records in India have been adjudged as poorly maintained, spread across various departments.⁴⁶ At least fifty-two percent of the recorded forest area in the North-Eastern region remains unnotified under any legislation as 'forest land', according to one source.⁴⁷ As observed by a member of the JCP, for the definition to function effectively in conserving forest lands of the country, it is crucial that revenue department updates the status of forest lands from time to time.⁴⁸

⁴² *Why Green Pledges will not Create the Natural Forests We Need*, YALE ENVIRONMENT 360, April 16, 2019, available at <https://e360.yale.edu/features/why-green-pledges-will-not-create-the-natural-forests-we-need> (Last visited on November 10, 2023).

⁴³ *Joint Committee Report*, *supra* note 6, ¶2.2.12.

⁴⁴ *Id.*, ¶2.4.36.

⁴⁵ *Id.*, ¶2.4.31.

⁴⁶ PRS LEGISLATIVE RESEARCH, *Land Records and Titles in India*, 4, available at https://prsindia.org/files/policy/policy_analytical_reports/Land%20Records%20and%20Titles%20in%20India.pdf (Last visited on December 8, 2023).

⁴⁷ Pia Sethi, [Commentary] *What does the Forest (Conservation) Amendment Act mean for Northeast India?*, MONGABAY, August 9, 2023, available at <https://india.mongabay.com/2023/08/commentary-what-does-the-forest-conservation-amendment-act-mean-for-northeast-india/> (Last visited on December 14, 2023).

⁴⁸ *Joint Committee Report*, *supra* note 6, ¶ 2.4.17.

Further, theoretically, intangible facilities provided by a forest such as storing anthropogenically generated carbon, providing fresh air, and aiding in sustenance of faunal wildlife, *inter alia*, crosses land boundaries. Recently, in *H.P. Bus-Stand Management & Development Authority v. Central Empowered Committee*,⁴⁹ the ideological founding of environmental rule of law was said to be “on the need to understand the consequences of our actions going beyond local, State and national boundaries”.⁵⁰ The effect of this amended provision is that if forest on one’s private land is not documented as such by government, then such land is outside the purview of the legislation, i.e. they have the autonomy to destruct the forest/tree cover without any prior permission from Union Government or State Government, under the FCA. Given the grim state of recordkeeping in India and erroneous application of the forest definition, leading to the misclassification of non-forest areas as forests, a heavy reliance on government records will not serve the overarching purpose of protecting forests. By entangling policy in a reductionist view of forests, which is limited to trivial classification and labels of forests as per government records which fail to keep track of changes in forest cover, formulation of a time-sensitive conservation strategy has been put on hold. This approach hinders the nation’s ability to expand and conserve carbon sinks, and to achieve the net-zero emissions target in time.

C. FOREST TRACTS EXPLICITLY EXCLUDED FROM THE FCA APPLICATION

After laying down the broad definition of the forest land that is protected under FCA, §1A(2) of the Amendment Act goes on to explicitly exclude certain types of forest land from its application. It is noteworthy that the effect of excluding these areas from the application of FCA is projected to have perilous impacts on the forest cover of the country.⁵¹ This has been substantiated below, wherein the paper has dissected and contextualised each type of excluded area for gauging its ramifications.

1. Excluded Areas 1 and 2: Land Adjacent to Rail Line or Public Road, and Unrecorded Tree Plantations

First, §1A(2) excludes forest-land located along rail line, public road, or roadside amenity, to the extent of 0.1 hectares.⁵² This is a leeway given to highway-road widening projects, which now will not be mandated to seek a forest clearance for destructing forestland surrounding the road. Notably, in *A. Chowgule & Co. Ltd. v. Goa Foundation*,⁵³ (‘A. Chowgule’) a two-judge bench of

⁴⁹ (2021) 4 SCC 309.

⁵⁰ *Id.*, ¶49.

⁵¹ Amita Punj, *The Forest (Conservation) Amendment Act, 2023: A Death Knell*, Vol. 58, ECONOMIC AND POLITICAL WEEKLY (2023).

⁵² The Forest Conservation (Amendment) Act, 2023, Cl. 4, §1A(2)(a).

⁵³ (2008) 12 SCC 646 (‘A. Chowgule’).

the SC regretted that road-widening projects in general have had an extremely detrimental effect on the forest cover to fulfil the increasing traffic needs.⁵⁴ However, in *Lafarge Umiam Mining (P) Ltd. v. Union of India*,⁵⁵ ('Lafarge Umiam') the SC ruled that clearance for diversion of forest on the recommendation of Forest Advisory Committee⁵⁶ must precede environmental clearance.⁵⁷ This process is not limited to cases of mining but any project, including expansion of existing projects,⁵⁸ that seeks to impact forest cover under §2 of FCA, as clarified in T.N. Godavarman.⁵⁹ Prior to 2011, the two clearances were independent, which meant that if the broader environmental clearance was granted to a project, forest clearance was given under pressure without proper scrutiny of the impact on forest-land, due to the large-scale investment in the project.⁶⁰

After Lafarge Umiam, the NHAI disputed the feasibility of pre-requisition of forest clearance for linear projects and road widening ventures, saying that the linked nature of both clearances is more appropriate for mining projects.⁶¹ In 2013, the MoEFCC succumbed to this argument, reasoning that seeking of forest clearance led to an overall delay in undertaking these projects.⁶² However, the process of providing forest clearance involves *inter alia*, spot inspection, multiple enquiries, adherence to compensatory afforestation obligations.⁶³ These stages of approval inevitably require sufficient time for assessing the gravity of impact of the proposed project on the forest land before approving forest clearance. This exercise is crucial to balance forest conservation with importance and urgency of developmental projects. In light of the amendments, these projects, which fulfil the exemptive areal requirement, have now been absolutely exempted from obtaining forest clearance.

Second, this provision also excludes trees, plantations and reafforested land not covered by sub-section 1 (that is unrecorded forest land), implying that any other type of forest-land such as plantations which are not recorded as forests in governmental records, as discussed before, will not be subject to Union Government approval requirement.⁶⁴ This incentivises commercial plantation for lucrative produce, rather than conserving plantations for expansion of carbon sink, as envisaged by the Preamble of the FCA.

⁵⁴ *Id.*, ¶¶25, 26, 27.

⁵⁵ (2011) 7 SCC 338 ('Lafarge Umiam').

⁵⁶ Constituted under the Forest Conservation Act, 1980, §3.

⁵⁷ Lafarge Umiam, *supra* note 55; see also Shyam Divan & Armin Rosencranz, ENVIRONMENTAL LAW AND POLICY IN INDIA: CASES AND MATERIALS, 464, 465 (Oxford University Press, 2022).

⁵⁸ T.N. Godavarman, *supra* note 29, ¶4.

⁵⁹ *Id.*, ¶11.

⁶⁰ *The MoEF-NHAI Roadblock*, DOWN TO EARTH, February 15, 2013, available at <https://www.downtoearth.org.in/news/the-moefnhai-roadblock-40198> (Last visited on November 10, 2023).

⁶¹ *Id.*

⁶² *Id.*

⁶³ The Forest (Conservation) Rules, 2022, Rr. 9 and 11.

⁶⁴ The Forest Conservation (Amendment) Act, 2023, Cl. 4, §1A(2)(b).

2. Excluded Area 3: ‘Nationally Important’ Projects and ‘Security Related’ Infrastructure

Perhaps the most contentious addition, §1A(2)(c) of the Amendment Act withdraws application of FCA from three types of forest areas. *First*, forest existing within 100 kilometres from international borders for ‘strategic linear projects’ of national importance and concerning national security. *Second*, forest in ten hectares where a security-related infrastructure is proposed to be built. *Third*, forest within five hectares in a Left-Wing extremism area where any security-related or public-facility infrastructure is proposed to be constructed.⁶⁵ This provision adds to the ambiguities created by the amendments as it introduces the shield of ‘national importance’ to justify blatant ecological destruction. The exemptions granted for security-related infrastructure within a 100-kilometre radius from international border, and areas affected by Left-Wing extremism require comprehensive discussion due to the gravity of their consequences.

Perhaps the most consequential and damaging exemption is the 100-kilometre immunity measured from international borders. To understand the gravity of its impacts, studying geographical forest cover distribution in India is crucial. The India State of Forest Report, 2021, is the latest governmental data documenting forest cover.⁶⁶ However, this report has been challenged, particularly in regard to inflated numbers on forest cover due to the inclusion of areas which cannot be defined as forest – such as commercial plantations. This is due to the lack of biodiversity in terms of native flora and fauna thriving in these areas.⁶⁷ Therefore, while the forest’s dictionary definition that is broad in its scope is being used to document forest cover and misrepresent the real state of natural forests, the same definition is being constricted when it comes to conserving forests through FCA. However, even if one considers this data, the problem sought to be pointed out becomes evident. Broadly, on a forest cover map of India, certain areas appear to be the densest in terms of forest cover. The contiguous strip starting from Jammu and Kashmir and Ladakh, going through Himachal Pradesh, Uttarakhand, and re-emerging in the North Eastern region, parts of Chhattisgarh, along with smaller parts in Odisha and Andhra Pradesh, and the Western Ghats.⁶⁸

⁶⁵ *Id.*, Cl. 4, §1A(2)(c).

⁶⁶ PRESS INFORMATION BUREAU, *India State of Forest Report 2021 (ISFR)*, January 20, 2022, available at <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2022/jan/doc20221207001.pdf> (Last visited on November 10, 2023).

⁶⁷ Esha Roy, *Explained: Takeaways from Forest Report*, THE INDIAN EXPRESS, January 14, 2022, available at <https://indianexpress.com/article/explained/takeaways-from-india-state-of-forest-report-7722163/> (Last visited on November 10, 2023).

⁶⁸ *India Interactive Forest Map & Tree Cover Change Data*, GLOBAL FOREST WATCH, available at <https://www.globalforestwatch.org/map/country/IND/?map=eyJjZW50ZXIiOnsibGF0IjoyMS44NDUzNzY1NTI1ODAwMjUzOTU0OTg2NH0sInpvc20iOiMuNjEzNjI1MDkyNjUxNDA0OCwiY2FuZm91bmQmOQmZhbHNFbQ%3D%3D> (Last visited on November 10, 2023).

As a logical corollary, the most deeply-impacted border area which is potentially under radar for massive forest destruction is the Indo-China border area, particularly across the ‘chicken neck’.⁶⁹ In the North-Eastern region, Arunachal Pradesh (66,431 square kilometre) follows Madhya Pradesh in category of the largest area as forest cover in absolute numbers.⁷⁰ Within the State, seventy-nine percent of land is forest land, second only to Mizoram which has eighty-four percent of land covered by forest.⁷¹ Mizoram, Manipur, Nagaland, Tripura and Meghalaya together harbour over 71,437 square kilometres of forest-land, which is seven and a half percent more than Arunachal Pradesh in absolute numbers.⁷² In all these States, forest area is spread uniformly and thus, the 100-kilometer perimeter has an imminent potential of affecting natural forests and biodiversity hotspots, particularly part of Indo-Burma Hotspot located here.⁷³

More concerning is the warning flag raised by Nagaland and Sikkim in their submissions before the JCP, that the 100-kilometre exemption will subsume these two States entirely.⁷⁴ While the MoEFCC stated that the exemption does not mean that the entire 100-kilometre area will be razed,⁷⁵ concern remains that once the 100-kilometre exemption is put in place, the entire area is under perpetual threat of being cleared out without any Union Government approval requirement. Hence, it is a door which can be opened at any time but the question is not whether one will open it or not.

The 100-kilometre exemption has been given for ‘strategic linear projects’ of ‘national importance and national security’. These terms are ambiguous and widely contentious. The bogey of national importance and national security has been misused in many cases, most notably in the *Char Dham* road widening project, where the SC also succumbed to these abstract concepts.⁷⁶ In this case, the minority members of the High Powered Committee which was tasked with

⁶⁹ This does not mean that Himachal Pradesh and Uttarakhand will not be impacted. While some parts of these states will potentially get affected, the problem is graver in the North East given the absence of Alpine Topography in the 100-kilometre perimeter as in the case of Himachal Pradesh and Uttarakhand (due to which their prominent forest cover areas will not be affected as much as in North East).

⁷⁰ *Forest Cover in India – 2021*, ENVIS RP ON FORESTRY AND FOREST RELATED LIVELIHOODS, February 23, 2023, available at https://frienvis.nic.in/Database/Forest-Cover-in-India-2021_3550.aspx (Last visited on November 10, 2023).

⁷¹ *Id.*

⁷² *Id.*, While Assam shares border with Bangladesh, the area within 100-kilometre perimeter does not have substantial forest cover. Thus, including Assam’s forest cover, which follows Arunachal Pradesh in absolute numbers, in the argument will do injustice by disproportionately comparing the huge forest cover beyond the 100 kilometre perimeter with the relatively shorter length of international border with Assam.

⁷³ *Here’s a Look at 6 Biodiversity Hotspots of India*, THE HINDU, May 31, 2021, available at <https://www.thehindu.com/children/wild-wonderlands/article34686553.ece> (Last visited on November 10, 2023).

⁷⁴ *Joint Committee Report*, *supra* note 6, ¶¶2.4.31, 2.4.33.

⁷⁵ *Id.*, ¶2.4.17.

⁷⁶ *Supreme Court Allows Defence Ministry’s Plea to Allow Double Lane Widening of Char Dham Highway Project*, LIVE LAW, December 14, 2021, available at <https://www.livelaw.in/top-stories/>

analysing the feasibility of widening of highway, connecting the *Char Dham* Pilgrimage, were of the opinion that while national security is of importance, it should not be operationalised at the expense of cutting slopes unscientifically.⁷⁷ The Ministry of Defence argued that the constituent projects, including the road-widening project, were important for aiding increasing threat along the international border.⁷⁸ The SC, agreed with the same, while also acknowledging that the road-widening project specifically posed potential threat to wildlife and water availability.⁷⁹ However, the court asserted that these could be rectified by taking remedial measures.⁸⁰

Another significant case where the SC restricted itself from enquiring into reasons behind invoking ‘national security’ was *Ex-Armyemen’s Protection Services (P) Ltd. v. Union of India* (‘Ex-Armyemen’s Protection Services’).⁸¹ While this case is not pertaining forest conservation, it is important while considering the significance of the using ‘national security’ by the State as a reason to claim *carte blanche* in its activities, particularly when considering the scope of exemption under consideration. The bench stated that ‘national security’ could involve territorial integrity, economic solidarity, and ecological balance, *inter alia*.⁸² The same could not be questioned by the court as it is a matter of policy.⁸³

Shedding some light on a conceptual debate on murkiness of national importance as a reason for subordination of every other concern is inevitable. In as long as back as 1952, Arnold Wolfers, in his paper cautioned against the slippery slope of labelling ventures as that of national importance or catering to national security.⁸⁴ Wolfers observed that a narrow interest of non-negotiable national supremacy is dominating the landscape of international relations leading to a constricted window for international cooperation.⁸⁵ This is problematic because within a nation, the subjective perception about what constitutes national importance makes the concept more abstract, and thus, vulnerable to arbitrary misuse by the ruling dispensations.⁸⁶

Security’ itself can cover highly polar principles.⁸⁷ For instance, one may counter the government’s perception of national security by arguing that con-

char-dham-highway-project-supreme-court-allows-defence-ministrys-plea-to-allow-double-lane-widening-187588 (Last visited on November 10, 2023).

⁷⁷ Citizens for Green Doon v. Union of India, 2021 SCC OnLine SC 1243, ¶69.

⁷⁸ *Id.*, ¶75.

⁷⁹ *Id.*, ¶117.

⁸⁰ *Id.*, ¶120.

⁸¹ (2014) 5 SCC 409.

⁸² *Id.*, ¶15.

⁸³ *Id.*, ¶16.

⁸⁴ Arnold Wolfers, “National Security” as an Ambiguous Symbol, Vol. 67, POL. SCI. Q., 481-502 (1952).

⁸⁵ *Id.*, 483.

⁸⁶ *Id.*, 485.

⁸⁷ *Id.*, 484.

servation of biodiversity-rich natural forests in the North-East with strict focus on regeneration of damaged forest areas is of national importance and national security given the transboundary threat of climate crisis. ‘Ecological balance’ was even mentioned as one of the interpretations of national security by the SC in *Ex-Armymen’s Protection Services*.⁸⁸ By aggravating the already grave state of affairs in terms of mitigating climate change, one can foresee climate migration which has the potential to endanger national security in the future. A class of forced displacement, climate change-induced migration occurs when people emigrate from regions that develop unviable and uninhabitable characteristics, such as scarcity of water, flooding, deadly temperature records, failure of farming prospects, *inter alia*.⁸⁹

The latest IPCC report confirmed the causal relationship between climate change and involuntary migration with ‘high confidence’.⁹⁰ Thus, as Wolfer asserts, the bogey of national importance also passes through a moral judgment where it is weighed against its alternatives. Apt choice then becomes the one which is “sufficiently good to justify the evil of sacrificing others”.⁹¹ Abandoning the obligation of conserving natural forest ecosystem to avert the worst impacts of climate change, for prioritising ‘national security’ as signified by building transportation and accessibility facilities for international border, is a choice that has not been justified satisfactorily. The *modus operandi* of the latter has not been questioned on the basis of grave consequences rendered by overlooking the significance of forest conservation, especially when part of these forests is concentrated near border areas in India.

The notion of subjectivity ingrained in justifications based on ‘national importance’ or ‘national security’ attests that governments must restrain from basing their policies on these concepts. The absolute absence of a yardstick to determine what constitutes ‘national importance’ and its fluidity on the basis of ideological leanings, calls for its permanent disposal so as to prevent its misuse. Otherwise, there are innumerable cases where every policy decision may be deemed as nationally important at the cost of an equally crucial and nationally important policy decision. As evident in the provision at hand, the prioritisation of strategic linear projects is ending up endangering the most indispensable area of natural-forest cover in India which is also as important to wildlife inhabiting the forests and humankind at large, for averting multiple planetary failures.

⁸⁸ *Ex-Armymen’s Protection Services (P) Ltd. v. Union of India*, (2014) 5 SCC 409, ¶15.

⁸⁹ INTERNATIONAL ORGANIZATION FOR MIGRATION, *Migration and Climate Change*, November 16, 2008, available at https://publications.iom.int/system/files/pdf/mrs-31_en.pdf (Last visited on December 10, 2023).

⁹⁰ IPCC, 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 733 (§5.4.2.1).

⁹¹ Wolfers, *supra* note 84, 498, 499.

In cases of conflict between ‘national importance’ and forest conservation, even the SC has been reluctant to prioritise the latter. In *M.C. Mehta v. Union of India*,⁹² forest clearance for construction of the Eastern Dedicated Freight Corridor was approved by the court on the recommendation of the Centrally Empowered Committee (‘CEC’), the designated advisory body prior to the shift in authority to MoEFCC on September 5, 2023.⁹³ The basis on which the approval was granted was ‘national importance’ and ‘public interest’, completely disregarding the crucial existence of the forest.⁹⁴ The number of trees in question was over four thousand, the felling of which was allowed on the singular primary reason of ‘national importance’ as observed by the CEC. While assurance to undertake compensatory planting of 25,000 trees was given by the project proponent, the SC in *A Chowgule* had observed that compensatory afforestation in India does not restore the *status quo ante*, with the natural forest ecosystem being irreversibly destroyed.⁹⁵

Even if one accepts the ground of ‘national importance’ and ‘national security’, the next question in the scheme of this Amendment Act is who determines whether a project is covered by either exception. Incidentally, the Government of Himachal Pradesh raised this question in its submission before the JCP. The MoEFCC replied that the projects exempted will be such projects “as may be identified by the Ministry of Defence (‘MoD’) and Ministry of Home Affairs (‘MHA’) of the Central Government”.⁹⁶ The relevant stakeholder has clearly been ruled out, i.e. the MoEFCC itself. Given that the MoD and MHA will often, if not always, prioritise border security due to their own interests, the next question arises as to why did the MoEFCC surrender its mandate by giving the sole authority of determining national importance and security to these two ministries? For determining the magnitude of national importance and national security *vis-à-vis* the ecological fragility of the area concerned, should the scales not be balanced with MoEFCC on the one side with MHA and MoD on the other?

This is not to suggest that such inclusion of MoEFCC would obviate the problem of balance entirely, given its traditional subordinate treatment amongst other ministries due to the priority given to MoD and MHA in identifying projects of national importance. Additionally, budgetary allocation to MoEFCC *vis-à-vis* the ‘core’ ministries such as MHA and MoD is proof of how MoEFCC is placed at a relatively lower pedestal that may affect the ministry’s bargaining power even if it is labelled as one of the stakeholders in deciding upon projects of

⁹² *M.C. Mehta v. Union of India*, (2016) 15 SCC 360.

⁹³ Jay Mazoomdaar, *Central Empowered Committee: SC Hands Over its Green Watchdog Committee to Environment Ministry*, THE INDIAN EXPRESS, September 8, 2023, available at <https://indianexpress.com/article/india/central-empowered-committee-sc-hands-over-its-green-watchdog-committee-to-environment-ministry-8929659/> (Last visited on November 10, 2023).

⁹⁴ *M.C. Mehta v. Union of India*, (2016) 15 SCC 360, ¶5.

⁹⁵ A. Chowgule, *supra* note 53, ¶¶23, 24, 25.

⁹⁶ *Joint Committee Report*, *supra* note 6, ¶2.4.32.

‘national importance’.⁹⁷ Additionally, the said ‘core’ ministries are almost always prioritised in policymaking and popular mobilisation. For instance, the National Highway Authority of India (‘NHAI’), which is part of another core ministry – the Ministry of Road Transport and Highways, sought exemption from seeking forest clearances for linear projects, that was granted by MoEFCC as soon as the NHAI sought SC’s intervention.⁹⁸ This makes the MoEFCC comparatively redundant in inter-ministerial discussions, which can be partly attributed to the budgetary disparity.

Similarly, the other area which has been explicitly excluded from the application of FCA is the five-hectare exemption for Left-Wing Extremism affected areas “as may be notified by the Central Government”. This exemption is also problematic given that parts of Chhattisgarh which may potentially be deemed affected areas, harbour some of the most ancient forest regions, which are critical to the wildlife as well as the tribes residing therein such as the *Gond*, *Halba*, *Dhurvaa*, *Murria*, *Abujhmadia*, and *Bison Horn Maria* in Bastar and Narayanpur,⁹⁹ which have been included as districts in said areas.¹⁰⁰

Further, there is an ambiguity as to extent of area which can be identified by the Union Government, in one go. This loophole can be misused by identifying multiple such areas in a larger region to facilitate multiple five-hectare exemptions. For instance, going by the provision, two areas, measuring six hectares each in the vicinity of each other but not contiguous can be notified as two separate Left-Wing Extremism affected areas which will in effect give a total of a ten-hectare exemption. Contrastingly, identifying and clubbing the said two contiguous areas of twelve hectare as one would only grant an exemption of five hectares. As outlined earlier, Chhattisgarh and parts of adjacent States harbour some of the densest forest areas of the country. Given that these areas are also susceptible to being notified as Left-Wing Extremism affected areas, the forest tracts located here have, in turn, been made vulnerable to deforestation for infra-structural purposes.

⁹⁷ *MoEFCC’s Actual Expenditure Reduced by Nearly 20% of Budget Estimates: Parliamentary Report*, DOWN TO EARTH, March 21, 2023, available at <https://www.downtoearth.org.in/news/climate-change/moefcc-s-actual-expenditure-reduced-by-nearly-20-of-budget-estimates-parliamentary-report-88365#:~:text=While%20the%20budget%20allocation%20for,Sabha%20on%20March%2020%2C%202023> (Last visited on November 8, 2023).

⁹⁸ *The MoEF-NHAI Roadblock*, DOWN TO EARTH, February 15, 2013, available at <https://www.downtoearth.org.in/news/the-moefnhai-roadblock-40198> (Last visited on November 10, 2023).

⁹⁹ Chhattisgarh Tribal Research and Training Institute, *Tribal in Chhattisgarh*, available at <https://cgtrti.gov.in/> (Last visited on December 11, 2023).

¹⁰⁰ PRESS INFORMATION BUREAU, MINISTRY OF HOME AFFAIRS, *Development of LWE Affected Areas*, December 20, 2022, available at <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1885150#:~:text=Districts%20covered%20Under%20SRE%20Scheme,-Andhra%20Pradesh&text=Aurangabad%2C%20Banka%2C%20Gaya%2C%20Jamui,Nawada%2C%20Rohtas%2C%20West%20Champanan.&text=Balrampur%2C%20Bastar%2C%20Bijapur%2C%20Dantewada,%2C%20Sukma%2C%20Kabirdham%2C%20Mungeli> (Last visited on December 11, 2023).

D. *ACTIVITIES NOT TO BE INTERPRETED AS 'NON-FOREST' ACTIVITIES*

The last disputable amendment introduced is an extension in the list of activities which cannot be deemed as non-forest activities.¹⁰¹ This extension is crucial since by identifying an operation as not related to any non-forest purpose, no approval of the Union Government is mandated under §2 for razing forest-land. There are at least three concerning exemptions provided by the amendment which include, establishing zoos and safaris,¹⁰² creating eco-tourism facilities,¹⁰³ and surveying and exploration,¹⁰⁴ coupled with a residuary clause stating “any other like purpose, which the Central Government may, by order, specify”.¹⁰⁵ Regarding the creation of zoos, safaris and eco-tourism facilities, the only non-commercial and non-profit-based argument given by the MoEFCC is that these activities will ensure employment for local people.¹⁰⁶ However, beyond this, the provision for deeming them as non-forest activities opens the floodgates for creating tourism-promoting facilities for the dominant reason of generating revenue at the cost of degrading natural forest areas. This raises eyebrows as to whether the primary objective of the FCA’s is indeed conservation or if it is being overshadowed by economic considerations.

Even the justification of employment generation can be disputed to an extent, as with Hasdeo Aranya coal mining project.¹⁰⁷ Indigenous communities of the region who opposed the project through the Hasdeo Aranya Movement did not prefer employment generated through coal mining because of its short-term nature. In case of zoos and safaris, which are relatively permanent establishments, the possibility of restricting movement of tribal people across forest stretches for aiding in tourism prospects cannot be ruled out, rendering their culture and traditional livelihood vulnerable.¹⁰⁸ The forest provides them with perpetual livelihood of gathering forest produce and healthy living conditions. While MoEFCC submitted before JCP that provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (‘FRA’) and Panchayat Extension to Scheduled Areas, 1996 (‘PESA’), legislations that guarantee certain rights over the management of forest to the indigenous communities, will not be

¹⁰¹ The Forest Conservation (Amendment) Act, 2023, Cl. 4.

¹⁰² *Id.*, Cl. 5, §2(1), Explanation (vi).

¹⁰³ *Id.*, Cl. 5, §2(1), Explanation (vii).

¹⁰⁴ *Id.*, Cl. 5, §2(2).

¹⁰⁵ *Id.*, Cl. 5, §2(1), Explanation (viii).

¹⁰⁶ *Joint Committee Report, supra* note 6, ¶2.5.8.

¹⁰⁷ ‘It was a Set-Up, We were Fooled’: The Coal Mine that Ate an Indian Village, THE GUARDIAN, December 20, 2022, available at <https://www.theguardian.com/environment/2022/dec/20/india-adani-coal-mine-kete-hasdeo-arand-forest-displaced-villages> (Last visited on November 10, 2023).

¹⁰⁸ Gana Kedlaya, *Forest Act Amendments: The Perils of Relying on Zoos, Safari Parks for Wildlife Conservation*, DOWN TO EARTH, August 17, 2023, available at <https://www.downtoearth.org.in/blog/wildlife-biodiversity/forest-act-amendments-the-perils-of-relying-on-zoos-safari-parks-for-wildlife-conservation-91212> (Last visited on December 11, 2023).

affected by the amendments,¹⁰⁹ there is no explicit mention of the same within the Amendment Act. An express declaration of the overriding application of PESA and FRA will have the effect of safeguarding the Gram Sabha consent requirement even if the forest clearance approval requirement is eliminated through the amendments. The absence of such clarification has created a legal ambiguity about the status of PESA and FRA application even if it was submitted before the JCP that they would be operational even after the amendments.¹¹⁰

In the case of Hasdeo Aranya, even in the presence of forest clearance requirement a far more destructive activity of mining got underway. The clearance was based on fake and forged signatures,¹¹¹ of respective Gram Sabhas, the consent of which is required for forest clearance as per FRA,¹¹² and for any substantial change made in the areas covered by PESA.¹¹³ It is not difficult to imagine greater impunity and non-transparency in the absence of forest clearance requirement for creating eco-tourism and zoo/safari facilities in forest areas. Requirement for gauging local people's opinions via the forest clearance assessment by the Forest Advisory Committee ('FAC'),¹¹⁴ will be done away with, and the scenario could further aggravate if even the consent provisions under PESA and FRA are not followed in substance. The FRA and PESA require the consent of Gram Sabha for any change in terms of developmental projects, and changes in forest landscape. It is a substantive form of public consultation as followed in the EIA process.¹¹⁵

Another significant addition to the list of exempted activities has been of survey such as reconnaissance, prospecting, investigation or exploration.¹¹⁶ Regarding the exemption to exploration and surveying activities, it is not difficult to deduce that it creates a conducive environment for future coal-oil or any other mineral exploration, and subsequent mining. Exploration and seismic surveying are preliminary steps in identifying areas which are rich in minerals, and thus, viable for extraction and mining. It is well-known that in majority of the cases the land under forests harbours lucrative minerals.¹¹⁷ According to the statistics recorded by the Ministry of Mines, Chhattisgarh, Odisha and Jharkhand are

¹⁰⁹ *Id.*, ¶2.4.60.

¹¹⁰ *Joint Committee Report*, *supra* note 6, ¶2.4.60.

¹¹¹ Pragathi Ravi, *How are Chhattisgarh's Tribals Fighting Back Miners in Central India's Densest Forest?*, FRONTLINE (THE HINDU), June 26, 2022, available at <https://frontline.thehindu.com/environment/tribal-resistance-how-are-chhattisgarhs-tribals-fighting-back-miners-in-central-indias-densest-forest/article65553285.ece> (Last visited on December 11, 2023); *see also* The Wire Staff, *Hasdeo Arand: Second Phase of Tree-Cutting Begins for Coal Project, Stops After Protests*, THE WIRE, May 31, 2022, available at <https://thewire.in/rights/hasdeo-arand-second-phase-of-tree-cutting-begins-for-coal-project-stops-after-protests> (Last visited on December 11, 2023).

¹¹² The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, §§3, 4, 5.

¹¹³ The Panchayats (Extension to the Scheduled Areas) Act, 1996, §4.

¹¹⁴ The Forest (Conservation) Act, 1980, §3.

¹¹⁵ The Environment Protection Act, 1986, §3.

¹¹⁶ *Id.*, §2(2).

¹¹⁷ The National Mineral Policy, 2008, ¶2.3.

among the leading States in mineral extraction, which is significant in the light of forest area distribution that was outlined earlier.¹¹⁸

In the case of Hasdeo, coal extraction was the focal point and in North-East, numerous reserves of mineral resources and fossil fuels, including oil and gas, are at stake.¹¹⁹ The exemption for surveying essentially means that these forests could now be tested for minerals underground. One might argue that surveying does not mean that the forest will be destroyed for extraction *per se*. However, this would not be a far-fetched assumption, given the tangent on which our forest conservation policy is proceeding. As witnessed from the Amendment Act, forest clearance approval for mining post-exploration may be given in any case. Exempting exploration and surveying activities in fact eases the process for the larger prospect of mining by removing oversight on the intention behind such exercise.

The last issue herein is the residuary clause which vests powers to the Union Government to include more forest activities in the list, and is in consonance of the multiple residuary clauses introduced by the amendments.¹²⁰ It is even more concerning given that these clauses are implicitly depriving the State governments of the authority over forest conservation policy as any State law will be declared repugnant if the same is contrary to the FCA, given the wide scope of residuary power.¹²¹ This pattern was also observed by some members of JCP and Government of Sikkim, apart from external experts.¹²²

For ease of understanding the journey of forest conservation regime in India, it is crucial to track the journey of jurisdiction shift in forest laws since 1927. The pre-1976 regime when only the State governments had the authority to manage forests under the IFA underwent a change in 1976 when both Central Government and State governments were made legitimate authorities to legislate on forests by making forests an entry under the Concurrent List.¹²³ Then came the FCA which subtly raised the Union Government to a higher pedestal by including the requirement of forest clearance approval from the Union Ministry of any project which is given a green signal by the State government.¹²⁴ Further, the Amendment Act clearly establish the exclusive authority to manage forests of Union Government which has usurped the power of State governments to legislate upon forests and attempt to actually conserve forests.

¹¹⁸ THE MINISTRY OF MINES, *National Mineral Scenario*, available at <https://mines.gov.in/webportal/nationalmineralsscenario> (Last visited on December 11, 2023).

¹¹⁹ Mirinchonme Mahongnao, Noklencyangla & Subhash Kumar, *Natural Resources and Socio-Economic Development in North East India*, Vol. 7(2), J. N. E. I. S., 93 (2017).

¹²⁰ The Forest Conservation Act, 1980, §3.

¹²¹ The Constitution of India, Art. 254; *see also* M. Karunanidhi v. Union of India, (1979) 3 SCC 431.

¹²² *Joint Committee Report*, *supra* note 6, ¶¶2.6.7, 2.6.10.

¹²³ The Constitution of India, Sch. VII, Entry 17A (Forests).

¹²⁴ The Forest Conservation Act, 1980, §2.

As stated by a five-judge bench in *Rajiv Sarin v. State of Uttarakhand*, in instances where a State law relates to a subject regarding which a law has already been passed by the Parliament and is in direct conflict with the provisions of latter such that both cannot co-exist, then the State law will be repugnant under Article 254 of the Constitution.¹²⁵ While the legislative transition observed in India's forest conservation mechanism is remarkable in terms of the scope and actual effect of the FCA, the recording of forest data is equally imperative to understand the state of forests in India. The criteria and technicalities involved in the exercise of recording is replete with substantial misconceptions that also require an intensive enquiry.

III. ADMINISTRATIVE ISSUES: PROBLEMS WITH THE GOVERNMENTAL DATA ON FORESTS

The documentation of forest data by the FSI itself is fraught with a misunderstanding about the attributes of a forest. The FSI releases biennial reports titled 'Indian State of Forest Report' ('ISFR'), recording increment or decrement in forest cover and tree cover nationally and State-wise, apart from other forest-related data about India.¹²⁶ The latest data was released in 2021. According to the criteria used by FSI, all plots of land with a minimum area of one hectare and with at least ten per cent tree canopy density are covered in the definition of forest cover, irrespective of ownership.¹²⁷ Regarding plots of land which measure less than one hectare, and thus are not included in the definition of forest, are included in the broader category of tree cover.¹²⁸ *First*, the paper elaborates on how the FSI data is contested on the basis of mixing different types of tree collections to present an inflated number of tree cover. *Second*, a fundamental difference between tree plantation and forest has been presented which leads to the conclusion that confusing both while recording forest data misses the point of conserving natural forest cover.

In an investigative analysis on coverage of FSI data by The Indian Express under Deforestation Inc. project initiated by International Consortium of Investigative Journalists,¹²⁹ it was revealed that in the data released, one-third of total dense forests in India, largely located in recorded forests, have already been razed.¹³⁰ However, this fall in natural forest cover is hidden by including

¹²⁵ *Rajiv Sarin v. State of Uttarakhand*, (2011) 8 SCC 708, ¶33.

¹²⁶ PRESS INFORMATION BUREAU, *India State of Forest Report 2021 (ISFR)*, January 20, 2022, available at <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2022/jan/doc20221207001.pdf> (Last visited on November 10, 2023).

¹²⁷ FOREST SURVEY OF INDIA, *India State of Forest Report 2021*, 20, available at <https://fsi.nic.in/forest-report-2021> (Last visited on December 15, 2023).

¹²⁸ *Id.*, 148.

¹²⁹ INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, *Deforestation Inc.*, available at <https://www.icij.org/investigations/deforestation-inc/> (Last visited on December 11, 2023).

¹³⁰ Jay Mazoomdaar, *The Case for Open, Verifiable Forest Cover Data*, THE INDIAN EXPRESS (DELHI), March 2, 2023, available at <https://indianexpress.com/article/explained/explained-climate/>

commercial tree plantations outside recorded forests in the ‘forest cover’ definition which indicates a major flaw in the definition used for forest while recording forest data.¹³¹ The ISFR 2021 itself clarified that the definition of forest cover is not qualified by the origin of tree crops, i.e. whether the land with trees is a natural forest or manmade forest (tree plantation).¹³² The report also caveated that lands with forest cover were differentiated on the basis of “ownership, land use and legal status”.¹³³ There is a protuberant irony about using the T.N. Godavarman definition, which is broad enough to cover all forest lands irrespective of ownership and classification, for recording forest data by the FSI, and thus, get inflated numbers. However, the same definition has been narrowed down to protect old, natural forests via the amendments to FCA. The assertion that there has been an inclusion of tree plantations to inflate forest cover percentage is evidenced by the fast increment in forest cover percentage over the years. The fast pace at which forest cover is increasing cannot occur without planting fast-growing plantation trees as natural forests cannot replenish in a short span of time.¹³⁴

Additionally, it must be noted that plantations are not considered as an equivalent substitute to natural forests which support an entirely diverse ecological system and house species of wild plants, insects and animals that facilitate habitable environment. For instance, insects such as different species of bees help in one of the most sensitive and fundamentally important processes for plant growth-pollination.¹³⁵

Forests are not just trees, they harbour an entire ecosystem that supports biodiversity, among other vital functions.¹³⁶ Trees by themselves are considered as “tree plantation”, without the identical features of biological diversity, erosion control and efficient carbon sequestration as of natural forests.¹³⁷ Even though tree plantations can help in achieving the carbon sink target, the incentive of harvesting these plantations for lucrative timber overpowers the incentive of

india-forest-tree-cover-data-deforestation-explained-8474163/ (Last visited on December 11, 2023).

¹³¹ *Id.*

¹³² FOREST SURVEY OF INDIA, *India State of Forest Report 2021*, available at <https://fsi.nic.in/forest-report-2021> (Last visited on December 15, 2023).

¹³³ *Id.*

¹³⁴ Mazondaar, *supra* note 130; *Why Green Pledges will not Create the Natural Forests We Need*, YALE ENVIRONMENT 360, April 16, 2019, available at <https://e360.yale.edu/features/why-green-pledges-will-not-create-the-natural-forests-we-need> (Last visited on November 10, 2023).

¹³⁵ UNITED NATIONS ENVIRONMENT PROGRAMME, *Why Bees are Essential to People and Planet*, May 18, 2022, available at <https://www.unep.org/news-and-stories/story/why-bees-are-essential-people-and-planet#:~:text=According%20to%20bee%20experts%20at,many%20food%20crops%2C%20to%20reproduce> (Last visited on December 14, 2023).

¹³⁶ Ján Merganič et al., *Plant Diversity of Forests* in FOREST ECOSYSTEMS-MORE THAN JUST TREES, 3 (2012).

¹³⁷ STANFORD NEWS, Rob Jordan, *Poorly Designed Tree-Planting Campaigns could Do More Harm Than Good, According to Stanford Researcher and Others*, June 22, 2020, available at <https://news.stanford.edu/2020/06/22/planting-trees-threatens-forest/> (Last visited on December 23, 2023).

invisible carbon sequestration. Additionally, in a forest, trees exist in commensality with other species such as insects, animals, microorganisms, amongst others. This also furthers the case for having one holistic environmental legislation as artificial divisions between forest and biodiversity is counterintuitive.¹³⁸ Thus, when one talks about forest and its conservation, forests are at the top of the hierarchy, given their ecological richness and non-interference from humans. This was extensively noted in A. Chowgule.¹³⁹ The two-judge bench noted that when forest clearance is approved with a condition of reforestation (restocking natural forests with native species) or afforestation (restoring already deforested land), there has been a perpetual trend of unsuccessful replenishment or reverting to *status quo ante* with respect to the original natural forest land.¹⁴⁰ Local varieties are overtaken by fast-growing, exotic species such as eucalyptus that may fulfil the requirement of number of trees but not the wildlife and diversity in gene pool and species.¹⁴¹ Citing the fate of National Highway 1, the court observed that the road-widening projects have annihilated indigenous bird population as well as indigenous tree count which are replaced, again, by exotic and fast-growing trees as part of forest clearance obligations.¹⁴²

Reference can be made to a study conducted in Southwestern China, which delved into the effectiveness of tree plantations as substitutes for natural/native forests. This study becomes particularly pertinent, as it revealed that despite an increase in the tree cover of the region, the native forests suffered a net loss, similar to the situation in India.¹⁴³ The increase in tree cover was attributed to conversion of croplands to monocultural tree plantations.¹⁴⁴ The study recommended maintaining a distinction between native forest and tree plantations while framing national forest conservation policies due to the fundamental difference between them.¹⁴⁵ This is similar to what has been argued in the case of India, as discussed before. Even the definition provided by Food and Agriculture Organisation ('FAO'), which released the recent 'The State of the World's Forests 2022' report,¹⁴⁶ defined forest as an area of 0.5 hectare with a minimum of ten percent tree canopy and height of five metres. This can be satisfied by any commercial tree plantation as well, but the FAO's definition excludes such land if it

¹³⁸ Mary Christina Wood, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE*, 55 (Cambridge University Press, 2014).

¹³⁹ A. Chowgule, *supra* note 53, ¶23.

¹⁴⁰ *Id.*, ¶24.

¹⁴¹ *Id.*

¹⁴² *Id.*, ¶¶25-27.

¹⁴³ Fangyuan Hua, et al., *Tree Plantations Displacing Native Forests: The Nature and Drivers of Apparent Forest Recovery on Former Croplands in Southwestern China From 2000-2015*, Vol. 222, *BIOL. CONSERV.*, 113-124 (2018).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ THE FOOD AND AGRICULTURE ORGANISATION, *The State of World's Forests* (2022), available at <https://www.fao.org/publications/home/fao-flagship-publications/the-state-of-the-worlds-forests/en> (Last visited on December 14, 2023).

is used primarily for agriculture or is located in an urban area.¹⁴⁷ This caveat is easily overlooked by FSI while recording forest data, which applies the standard definition of forest mechanically, without delving into the actual nature of such ‘forest’.¹⁴⁸

Reverting to the study on Southwestern China’s forest cover, the authors observed the following, in terms of the decline in natural forest cover but increasing net tree cover,¹⁴⁹ “The growth of plantations in conjunction with the loss of native forests means that, far from setting the region’s forest landscape on a trajectory of recovery with concomitant benefits for biodiversity and other ecosystem services, the region’s tree-cover increase has, in effect, displaced native forests.”¹⁵⁰

The study also identified the malaise of inflating forest cover percentage and the potential harm it can cause to forest conservation policy. It can lead to misguided policy-making as conflating natural forests and human-made plantations leads to the misconception that forests are being conserved in their pristine state which is clearly not the case in the instant scenario. Given the fallacious criteria of identifying forest cover, along with the Amendment Act that has further watered down the vigour of applying FCA to protect India’s forests in reality, the primary question that arises is whether the country requires a new forest conservation law to align the national obligations as per the NDCs with the domestic legal framework. If yes, then on what lines should the new legislation be framed for ensuring the creation of a better forest conservation legal regime.

IV. OVERHAUL IN FOREST LAW OF INDIA: AN IDEAL FOREST CONSERVATION LAW

Conservation, restoration and replenishment of forests are measures that are agreed upon by climate scientists. Moreover, multiple planetary failures and unabashed crossing of tipping points necessitate that one takes a holistic approach in realising the importance of mitigating potentially adverse impacts on all forms of life on Earth. In the Sixth Impact Assessment Report of the Intergovernmental Panel on Climate Change, released in 2022, emphasis was given on reduction in deforestation through improvement in law enforcement, forest governance, and halting drivers of deforestation such as commercial agriculture, urban expansion, amongst others.¹⁵¹ The plummeting rates of deforestation could preserve biodiversity and other ecological systems that exist within the forest such as air and water

¹⁴⁷ *Id.*, 7.

¹⁴⁸ Jay Mazoomdaar, *Lutyens’ Bungalows, RBI, Encroachments are ‘Forests’ in Govt’s Forest Cover Map*, THE INDIAN EXPRESS (DELHI), March 2, 2023, available at <https://indianexpress.com/article/express-exclusive/lutyens-bungalows-rbi-encroachments-forests-govt-forest-cover-map-8474137/> (Last visited on December 14, 2023).

¹⁴⁹ Fangyuan, *supra* note 143, 4.

¹⁵⁰ *Id.*, 16.

¹⁵¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Sixth Impact Assessment Report: Working Group III, Climate Change 2022: Mitigation of Climate Change*, 779 (April 4, 2022).

filtration.¹⁵² Regarding afforestation and reforestation, the report encouraged tree plantations for the same but with forest restoration at the core of this exercise.¹⁵³ This means that such plantations must replicate the attributes of a natural forest through “well planned, sustainable” reforestation which strives to achieve a holistic ecological diversity apart from trees performing the primary role of a carbon sink.¹⁵⁴

The draft of first Global Stocktake under the Paris Agreement, of which India is a party, was created in the recently concluded 28th session of the Conference of Parties (‘COP28’).¹⁵⁵ It has defined the aims for forest conservation in unequivocal terms. The draft emphasised upon ‘halting’ and ‘reversing’ deforestation by 2030, along with prioritising forest restoration.¹⁵⁶ Additionally, the significant task of protecting, conserving ecosystems including forests, that means the holistic entity of forest ecosystem, was underscored.¹⁵⁷

Critically viewing the domestic forest conservation legal regime of India, it has become evident that the skewed prioritisation accorded to cases where forest conservation will not be an overriding obligation, will potentially thwart India’s international obligation as per the NDCs and the larger role to contribute in climate mitigation. The present scheme of the forest law is not in tandem with the urgency required to mitigate climate change and ensure ecological security of the country. The amendments have substantiated this observation. This has strengthened the necessity for overhauling forest conservation regime of the country. A new forest conservation law with certain attributes that have been elaborated upon below is the need of the hour to conserve, expand and preserve forests of India.

Taking a holistic view of the FCA, along with the amendments, it becomes evident that almost all the provisions are pertaining to how forests can be obliterated or manipulated to accommodate various needs, ranging from ‘national importance’ projects and establishment of ‘zoos and safaris’. For instance, the narrowing down of the definition delivers the message that forest conservation is limited to certain categories of forests as recognised by the definition clause. Even regarding these lands, the forest clearance obligation is no longer applicable if a forest tract falls within the ambit of expressly framed exemptions that have been included. Furthermore, the catalogue of activities which will not be interpreted as ‘non-forest purpose’, and thus not require the procurement of forest clearance,

¹⁵² *Id.*

¹⁵³ *Id.*, 780.

¹⁵⁴ *Id.*

¹⁵⁵ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, *Why the Global Stocktake is Important for Climate Action this Decade*, available at <https://unfccc.int/topics/global-stocktake/about-the-global-stocktake/why-the-global-stocktake-is-important-for-climate-action-this-decade> (Last visited on December 15, 2023).

¹⁵⁶ 28th Session of Conference of Parties to UNFCCC, *Draft Text by the President: First Global Stocktake under the Paris Agreement [Version 11/12/2023]*, ¶40, available at https://unfccc.int/sites/default/files/resource/GST_2.pdf (Last visited on December 15, 2023).

¹⁵⁷ *Id.*, ¶197.

has been expanded with a residuary power with the Union Government to further enlarge the list.

The aforesaid provisions introduced to the FCA are bound by a single thread that can be termed as a ‘thread of exemptions’. While the exceptions to application of the FCA have been outlined clearly, the actual applicability of the statute is rendered obscure since there is no provision that outlines obligations ‘towards’ forest conservation. The statute is limited to enumerating cases when a certain activity or forest tract will not be implicated by the FCA.

Given the grim state of forest cover in India, where the country has not been able to reach the domestic goal of covering thirty-three percent of total geographical land with forests even after thirty-five years of such resolution in 1988,¹⁵⁸ a new forest law with the following overarching features should be deliberated upon as delineated below.

A. RECOGNISE FORESTS AS PER THE THIRUMULPAD GODAVARMAN DEFINITION

The exercise of watering down the definition of forest for the application of FCA is counterintuitive while considering the necessity and international obligation of the country to expand carbon sinks. An ideal legislation on forest conservation should harp upon regulating forest management for every forest tract that fulfils the FSI definition. This definition states that all plots of land with a minimum area of one hectare and with at least ten per cent tree canopy density are to be considered ‘forest cover’, irrespective of ownership.¹⁵⁹ This definition, as noted before, is identical to the definition coined by the SC in 1996 in the landmark T.N. Godavarman judgment.¹⁶⁰ Artificial distinction on the basis of records and ownership should be avoided, given that these characteristics should not affect the manner in which forest conservation policy is framed. Exceptions on the basis of definitional restrictions are highly likely to be counterproductive to the target of creating carbon sink with an absorption capacity of 2.5 to three billion tonnes CO₂ equivalent by 2030,¹⁶¹ because of limited land resources to create new carbon sinks.

Restriction in definition creates a preliminary problem since non-applicability of the FCA on certain tracts restricts the remedy of even challenging the illegality of a *prima facie* case of forest destruction. The procedure involved

¹⁵⁸ The National Forest Policy of India, 1988, ¶4.1.

¹⁵⁹ FOREST SURVEY OF INDIA, *India State of Forest Report 2021*, 20, available at <https://fsi.nic.in/forest-report-2021> (Last visited on December 23, 2023).

¹⁶⁰ T.N. Godavarman, *supra* note 29, ¶4.

¹⁶¹ PRESS INFORMATION BUREAU, *Cabinet Approves India's Updated Nationally Determined Contribution to be Communicated to the United Nations Framework Convention on Climate Change*, August 3, 2022, available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1847812> (Last visited on November 10, 2023).

in forest clearance to assess the impact of a project on the forest tract under consideration is absolutely bypassed, whereas a project gets a *carte blanche* even though it may have a detrimental impact. This impact is detrimental to one of the core principles of environmental jurisprudence, namely, the precautionary principle, which obligates the government to treat precaution as an implicit consideration in decision-making process of developmental projects.¹⁶² In *Rajeev Suri v. DDA*, the SC stated that the existence of seeking environmental clearance under the Environmental Protection Act, 1986, is an embodiment of the precautionary principle.¹⁶³ Similarly, with specific reference to forests, the forest clearance requirement should be applicable across the spectrum of forests, irrespective of the various types of categorisations, to instil the State's obligation as per the precautionary principle in India's forest law regime.

Expanding the definitional scope of forests is imperative in light of the doctrine of sustainable development that has gained worldwide consensus when deliberating on establishing a compatibility between environmental preservation and economic development. In *BDA v. Sudhakar Hegde*, it was noted that the principle of sustainable development is not restricted to addressing failures with respect to environmental conservation, but obligates the State to ensure that such failures do not take place in the first place.¹⁶⁴ Incorporating a wide definition of forests has the potential to ensure that annihilation of country's forest cover does not occur with impunity and no governmental accountability.

Moreover, in *Essar Oil Ltd. v. Halar Utakarsh Samiti*, the court ruled that environmental laws (in the case, Wild Life (Protection) Act, 1972, was being considered) should be interpreted with the Stockholm Declaration, 1972, as an aiding tool, and was referred to as the 'Magna Carta'.¹⁶⁵ The 1972 declaration states that the conservation of natural resources such as forests should be accomplished by keeping the principle of intergenerational equity at its core.¹⁶⁶ The same has been upheld by SC in various cases including *Common Cause v. Union of India*,¹⁶⁷ and *Samaj Parivartana Samudaya v. State of Karnataka*.¹⁶⁸ Therefore, it is argued that while deliberating on how a forest law should be framed, the concept of intergenerational equity should also be a talking point, given the intergenerational benefits of forests along with the intergenerational consequences of climate change and biodiversity loss.

In the Rio Summit of 1992, one of the most important principles regarding combatting deforestation has been the strengthening of forest-related

¹⁶² *Rajeev Suri v. DDA*, (2022) 11 SCC 1, ¶524.

¹⁶³ *Id.*

¹⁶⁴ *BDA v. Sudhakar Hegde*, (2020) 15 SCC 63, ¶95.

¹⁶⁵ *Essar Oil Ltd. v. Halar Utakarsh Samiti*, (2004) 2 SCC 392, ¶25.

¹⁶⁶ The Declaration of the United Nations Conference on the Human Environment, 1972, Ch. I, Principle 3.

¹⁶⁷ (2017) 9 SCC 499, ¶¶207, 211.

¹⁶⁸ (2018) 13 SCC 501, ¶¶22, 23.

national institutions along with expansion in their scope.¹⁶⁹ It also emphasised on the curation of a set of national plans and programmes along with effective legislative exercise for promoting sustainable forest management.¹⁷⁰

Thus, in any case, the definition of forest should not be restricted or narrowed down. A broad definition that has applicability over all kinds of tracts that fulfil the dictionary meaning of a ‘forest’ will ensure that a course of action is available for grievance redressal. This preliminary green signal for all types of forests should not be considered as a peculiar feature of an ideal forest conservation law given that such a legislation should intend to protect forests of the country irrespective of human-made characteristics and qualifications.

B. DUTIES OF THE EXECUTIVE IN LINE WITH THE URGENCY OF CLIMATE CHANGE MITIGATION

An ideal forest conservation law should also frame an obligatory role of the executive, both the Union and State governments, in undertaking affirmative policies towards overall forest conservation paradigm. This should be on the lines of Article 48A that imposes a rather unenforceable obligation on the State to preserve the forests of India.¹⁷¹ Article 47, that obligates the State to ensure public health, can also be interpreted as a governmental obligation to legislate and make policies that ensure and keep intact a safe and healthy natural environment.¹⁷² However, the non-justiciable nature of these particular constitutional provisions is their most significant drawback. Thus, a forest legislation establishing such an affirmative obligation is *sine qua non* for codifying the principles of precautionary principle and sustainable development, as elucidated before.

The aforesaid intervention will also create a scope to hold the government accountable for fulfilling its conservation obligations. This obligatory role should include, but not be limited to, conservation of natural forest cover of the country by making the parameters of approving forest clearance stringent. The legislation should itself create limitations on the power of the executive to grant forest clearance such as enumerating mandatory parameters to be considered while balancing impacts of a project on the forest cover with its developmental necessity. These parameters should be inclined towards ecological conservation over unnecessary economic development, as suggested by the FPI,¹⁷³ and the adherence to the same should be subject to judicial and legislative checks. While SC in *Lafarge Umiam* made the implementation of FPI read with FCA justiciable,¹⁷⁴ the FPI should be considered as a framework and a new set of explicitly justiciable and

¹⁶⁹ The Rio Declaration on Environment and Development, Principle 11.2(a).

¹⁷⁰ *Id.*, Principles 11.3(c)-(d).

¹⁷¹ The Constitution of India, Art. 48A.

¹⁷² *Id.*, Art. 47.

¹⁷³ The National Forest Policy of India, 1988, ¶2.2.

¹⁷⁴ *Lafarge Umiam*, *supra* note 55, ¶122(i.1).

extensive obligations should be curated which incorporates the urgency of forest conservation requirements as has evolved over the years in international forums since 1988. This will ensure a new rigour in the forest conservation legal regime *vis-à-vis* the State's duties, along the lines of Lafarge Umiam.

The decisions on forest clearance *inter se* ministries should take place in such a manner that the MoEFCC is not relegated to the level of accommodating developmental interests in perpetuity. These decisions should see the MoEFCC taking the lead, with competing ministerial interests at a level playing field. This will enable reaching a result that is not a consequence of absolute ignorance of significant interests related to forests.

Another role of the executive should be to expand the carbon sinks by not only promoting tree plantations but also through forestry practices that make these tree plantations resemble natural forests, in terms of the biodiversity they exhibit. This could be interpreted in multiple ways. One method could be an obligation of the executive to frame schemes which promote forest plantations, over which the forest conservation law would be applicable in terms of protection from deforestation and other safeguards, without excluding such plantations by narrowing down the definition. In this, setting a target for the executive which is in consonance with the country's NDCs and the domestic goal as per the FPI, could enable a proactive response on the executive's part and accountability to the legislature and judiciary.

Further, the NDCs should not be a cap on the extent and number of actions taken by the government. Climate Action Tracker, an independent analytical body that weighs the NDCs of various countries in light of the ideal contribution towards climate mitigation, judged India's NDCs as 'highly insufficient'.¹⁷⁵ Regarding land use and forestry, the tracker has deemed the same as 'not significant'.¹⁷⁶ Therefore, while it is necessary to meet the goals set in NDCs, it should not be construed that the country needs to halt its mitigatory actions once the NDCs are achieved.

The exercise of imposing affirmative obligations of the government towards forest conservation will also codify the principle of public trust doctrine ('PTD') that has been used in Indian environmental jurisprudence in multiple instances. In *M.C. Mehta v. Kamal Nath*,¹⁷⁷ the attributes of PTD were recognised, and its application to natural resources of the country through Article 21 was recognised.¹⁷⁸ The SC pointed out that while it is the duty of legislature to create laws which balance the interests of the public in natural resources and destruction of

¹⁷⁵ Climate Action Tracker, *India*, December 4, 2023 available at <https://climateactiontracker.org/countries/india/> (Last visited on December 15, 2023).

¹⁷⁶ *Id.*

¹⁷⁷ (1997) 1 SCC 388.

¹⁷⁸ *Id.*, ¶35; see also Jona Razzaque, *Case Law Analysis: Application of Public Trust Doctrine in Indian Environmental Cases*, Vol. 13, J. ENVIRON. LAW, 229 (2001).

such resources by private entities, the courts are called upon to uphold the trust reposed in the State for protecting natural resources which are crucial for the existence of all, in the absence of a legislative framework.¹⁷⁹ Thus, creating such obligations will fill in a legislative and policy void for promoting forest conservation imperatives.

C. IDENTIFICATION OF SENSITIVE FOREST REGIONS – ‘NO-GO’ ZONES

Another important task at hand is to tag certain forest regions as ‘no-go zones’. These areas should be absolutely and unconditionally protected from any type of disturbance in terms of commercial encroachment such as construction of linear projects, and establishment of industries and mines. The IFA categorised forests into reserved, protected and village forests. While the reserved forests are at the top of the hierarchy in terms of protection granted from any encroachments detrimental to forest composition, it is important to note that these protections are largely against nominal encroachment by local communities, and not commercial activities such as mining, and building linear projects such as roadways and railways.¹⁸⁰ The prohibited activities in these forests include trespass of cattle, removal of forest produce, cultivator practices, amongst others. Even though the FRA provided some rights to the local people for utilising forest resources that form a part of their livelihoods,¹⁸¹ the crux of the matter is that such identification by the IFA provides a regressive approach towards forest conservation. It is noteworthy that certain level of protection has also been provided against fresh clearing, which can be interpreted as limiting commercial clearing activities involved in industrial and mining establishment. However, the same can be bypassed by §5, whereunder a contract with the Government for acquiring rights over the forest can provide leeway to clear a reserved forest.¹⁸²

To match the pace required to conserve and replenish the forest cover of India, it is imperative to identify areas with dense forest cover,¹⁸³ harbouring immensely diverse gene pool and biodiversity, and absolutely prohibit any type of commercial and large-scale encroachment in these areas. Meanwhile, if any rights under the FRA exist that empower usage of forest resources by local communities in such identified forests, the same should not be tampered with. Such identification can be undertaken with the help of satellite imagery, and the exercise should prioritise natural forest cover over tree plantations, given the distinctive attributes of the former which have been discussed before. The prioritisation will be in line with the country’s NDCs and the mitigatory requirements as determined by the

¹⁷⁹ M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388, ¶35.

¹⁸⁰ The Indian Forest Act, 1927, §§26(1)(d), (f), (g), (h).

¹⁸¹ The Forest Rights Act, 1927, §§3, 4, 5.

¹⁸² *Id.*, §26.

¹⁸³ FOREST SURVEY OF INDIA, *India State of Forest Report 2021*, available at <https://fsi.nic.in/forest-report-2021> (Last visited on December 15, 2023).

Global Stocktake. The Global Stocktake focussed attention on ceasing and reversing deforestation by 2030 along with safeguarding biodiversity.¹⁸⁴ It also promoted a multi-sectoral approach to frame policies that are directed towards protection and restoration of ecosystems including forests.¹⁸⁵

However, the identification should not be limited to dense natural forest cover. It should ideally be the initial phase of identification that can be expanded with increase in forest plantations. The same can be made dependent on the assessment of success of identification in the initial phase, in order for the drawbacks to be addressed for better action towards proliferating carbon sink area in the country.

D. DELEGATION OF POWERS TO INDIGENOUS PEOPLE – PARTICIPATORY GOVERNANCE

It has been recognised across the world, as manifested through global forums, that the role of indigenous people in preserving forest cover with their special knowledge is irreplaceable.¹⁸⁶ Their proximity to forests and perpetual dependence on forest resources aver that they have intricate know-how about how the forest ecosystem works and the various processes that could prove effective in replenishing forests. The FRA provides certain rights to the local communities to keep intact their livelihood options.¹⁸⁷ However, these communities should be raised from a passive role to an active participatory role in ensuring the well-being of forests. This approach resembles the line of thought proposed by the rights of nature movement that accords an equal stake to natural entities such as forests in all types of decisions that concern modifications in the natural environment.¹⁸⁸

These entities must be represented by people who have had an interdependent and intricate relationship with them, resulting in their know-how about the functioning of these entities, as seen in the case of Whanganui river in New Zealand.¹⁸⁹ Herein, an advisory body comprising the indigenous tribe Whanganui Iwi along with local government was created and tasked with taking care of the

¹⁸⁴ 28th Session of Conference of Parties to UNFCCC, *Draft text by the President: First global stocktake under the Paris Agreement [Version 11/12/2023]*, ¶41, available at https://unfccc.int/sites/default/files/resource/GST_2.pdf (Last visited on December 15, 2023).

¹⁸⁵ *Id.*, ¶71.

¹⁸⁶ UNITED NATIONS ENVIRONMENT PROGRAMME, *Unsung Heroes of Conservation: Indigenous People Fight for Forests*, April 5, 2023, available at <https://www.unep.org/news-and-stories/story/unsung-heroes-conservation-indigenous-people-fight-forests> (Last visited on December 15, 2023).

¹⁸⁷ The Forest Rights Act, 1927, §§3, 4, 5.

¹⁸⁸ Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, Vol. 45, SOUTH CALIF. LAW REV., 450 (1972).

¹⁸⁹ Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, THE GUARDIAN, March 16, 2017, available at <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> (Last visited on December 23, 2023).

river that was accorded the status of a juristic person.¹⁹⁰ Incorporating these principles in the forest conservation law will ensure a transition in the forest governance structure of India to a participatory approach, from a top-down approach.

The delegation of power to indigenous people could take the form of guarding the forests from illegal commercial encroachments including illegal logging, mining, and other industrial operations. They should also be vested with a right of first say while deliberating upon forest clearance applications. Even though the Gram Sabha consent requirement under FRA and PESA attempt to fulfil this goal,¹⁹¹ the secondary role of local communities should be elevated to a primary role in assessing the impact of project operations on the forest which will be complemented by a scientific assessment conducted by forest experts. Further, this preliminary assessment should be a mandate that ought to be strictly implemented without any scope for manipulation similar to what occurred in the case of Hasdeo Aranya, as noted before.¹⁹²

V. CONCLUSION

Forest conservation in India is at a crossroads where it is contingent upon us to take a side, either of unsustainable development under the pretext of ‘national importance’ and serving corporate interests, or of reforming the forest law regime by considering forests a core stakeholder and indispensable tool in averting the worst impacts of climate change and biodiversity loss.

The amendments introduced to FCA have given rise to substantial scepticism about the efficacy of ensuring protection of forests of India. The major characteristics that have dominated the amendments are tapering down the definition of forest for the applicability of FCA either by implicitly providing with a restrictive definition based on certain timelines and revenue records or by explicitly precluding certain forest tracts. The exemption from forest clearance to forests situated within 100 kilometres of international borders on the ambiguous and seemingly unquestionable justification of ‘national importance’ and ‘national security’ has prioritised development over conservation without leaving any scope of challenging such policy decisions. Additionally, the extension of this exemption to areas of up to five hectares in area in Left-Wing Extremism affected areas is

¹⁹⁰ Craig M. Kauffman & Pamela L. Martin, *How Courts are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia, and India*, Vol. 20, VERMONT JOURNAL OF ENVIRONMENTAL LAW, 271-273 (2019).

¹⁹¹ The Forest Rights Act, §§3, 4 & 5; The Panchayats (Extension to the Scheduled Areas) Act, 1996, §4.

¹⁹² Pragathi Ravi, *How are Chhattisgarh's Tribals Fighting Back Miners in Central India's Densest Forest?*, FRONTLINE (THE HINDU), June 26, 2022, available at <https://frontline.thehindu.com/environment/tribal-resistance-how-are-chhattisgarhs-tribals-fighting-back-miners-in-central-indias-densest-forest/article65553285.ece> (Last visited on December 11, 2023); see also The Wire Staff, *Hasdeo Arand: Second Phase of Tree-Cutting Begins for Coal Project, Stops After Protests*, THE WIRE, May 31, 2022, available at <https://thewire.in/rights/hasdeo-arand-second-phase-of-tree-cutting-begins-for-coal-project-stops-after-protests> (Last visited on December 11, 2023).

based on notifications of the Union Government that may be issued at any point of time in the future, along with ambiguity about the limit on the five-hectare areas that can be notified at any time. The amendments have further aggravated the conservation landscape by extending the list of activities that will not be construed as ‘non-forest purpose’ for the purpose of seeking forest clearance.

The ministerial hierarchy where the MoEFCC itself has been relegated to a secondary stakeholder in decisions related to forest diversion exhibits how the executive itself is not aligned with the basic ideals of forest conservation. The non-transparency is further reflected in the abysmal access to forest data and usage of a convoluted definition for documenting the said data.

A new holistic forest law is required which is based on preserving natural forests and biodiversity therein, rather than concerning itself with creating loopholes to avert the responsibility of restoration and maintaining the ecological integrity of forests. Such a law is a need of the hour in light of the rising scale of the climate and biodiversity crises across the world. The ideal law should be mindful of not restricting itself to artificially curated attributes of ownership and classification, as held by the SC in the 1996 T.N. Godavarman order. Additionally, such a law should also outline the obligations of the government towards forest conservation, instead of elaborating upon exemptions. Recognition of certain forest regions as ‘no-go zones’ due to their ecological sensitivity and importance will cater for keeping the country’s natural forest cover intact while expanding forest plantations at the same time. The incorporation of local communities in all the decisions, significant and insignificant, is another important characteristic that a forest conservation law should possess, given the distinctive knowledge about the functioning and their dependence on the forests.

A forest law that showcases the aforesaid attributes will potentially be an appropriate facilitative legal environment to accomplish the country’s NDCs and the larger obligation of mitigating climate change. The FCA in its current state, especially after the Amendment Act, is not adequate to accomplish the aim of expanding natural carbon sinks and aligning India’s conservation interests as expressed in the international forums such as the COP and UNFCCC. The necessity of overhauling the forest conservation rule of law in India has thus become crucial with certain policy measures that must be incorporated due to their ability to safeguard the forests. These measures include definitional widening, imposing affirmative obligations on the State to take over the role of forest guardianship, recognising forest-based ‘no-go’ zones where any manipulation should be strictly prohibited, and lastly, collaboration with indigenous communities residing in forest areas for gaining access to local knowledge about sustainable forest management. Incorporation of these principles should be a bare minimum requirement towards creating a law that has the potential to actually achieve forest conservation in India.